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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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A. The Question Whether A Defendant A Has Constitutional Right To Obtain Exculpatory Material Before Pleading Guilty Is Properly Presented

Respondent contends (Br. in Opp. 8-10) that the question whether a criminal defendant has a right to obtain exculpatory information before pleading guilty is not properly presented. In particular, she argues that the government acknowledged in the district court and before the court of appeals panel that it had a duty to turn over information relating to factual innocence, and challenged only its obligation to turn over the subset of exculpatory material relating to impeachment, thereby waiving its right to petition on the broader issue.

This Court's "traditional rule," however, "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis added). That rule "operates (as it is phrased) in the disjunctive,

permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*

The court of appeals in this case clearly "passed upon" the broader question framed by the government's petition—whether a criminal defendant has a right to obtain exculpatory material before pleading guilty. In the part of its opinion entitled "Wavier of *Brady* Rights in General," Pet. App. 8a, the Ninth Circuit expressly reaffirmed its holding in *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (1995), that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution," Pet. App. 9a. It further held in that part of the opinion that the rationale of *Sanchez* "applies with equal force to plea agreements," and, accordingly, that "plea agreements, and any waiver of *Brady* rights contained therein, cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." *Id.* at 10a. After resolving that general question, the panel went on in a separate part of its opinion entitled "Waiver of Impeachment Evidence" to reject any distinction between exculpatory information relating to factual innocence and exculpatory information relating to impeachment. *Id.* at 13a-16a. Because the court of appeals "passed upon" the general question whether a criminal defendant has a constitutional right to obtain exculpatory material before pleading guilty, that question is properly presented.

Moreover, the government acknowledged in the district court and before the panel that it had a duty to turn over exculpatory evidence relating to factual innocence only because the Ninth Circuit's prior decision in *Sanchez* had established such a duty, and that decision was binding on the district court and the panel. Once

the panel rejected the government's effort to limit *Sanchez* to non-impeachment material, the government sought rehearing en banc on the general question whether a criminal defendant has a right to obtain exculpatory material from the government before pleading guilty. In light of *Sanchez*, the government raised that question at the first available opportunity.

In any event, this Court is always free to decide a question that is logically antecedent to one presented below. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 382-383 (1995). That is the situation here. If the government has no duty to turn over any exculpatory material to a defendant before he pleads guilty, it follows that it has no duty to turn over the sub-class of such material that relates to impeachment.

This Court has addressed questions not pressed below in circumstances that make clear that there is no obstacle to the Court's consideration of the first question presented in this case. In *Williams*, the Court addressed the question whether an indictment may be dismissed because the government did not present exculpatory evidence to the grand jury, even though the government did not raise that question in the court of appeals. 504 U.S. at 40-43. The Court explained that it will decide an issue that is not pressed below "so long as it has been passed upon," *id.* at 41, and that the court of appeals had clearly "decided the crucial issue of the prosecutor's duty to present exculpatory evidence," *id.* at 43. The Court added that there was binding circuit precedent on the question presented at the time the government took its appeal, and the government had no obligation to "demand overruling of a squarely applicable, recent circuit precedent," which had rejected the government's position, as a precondition to raising the issue in this Court. *Id.* at 44.

In *Lebron*, the Court addressed petitioner's contention that Amtrak is a public entity even though petitioner had "expressly disavowed" that argument in both the district court and the court of appeals. 513 U.S. at 378-383. As in *Williams*, the Court observed that the issue "was addressed by the court below," and this Court's practice permits review of an issue not pressed "so long as it has been passed upon." *Id.* at 379. The Court also went on to emphasize that the argument regarding Amtrak's status as a public entity was a "prior question" to the one presented below, and that the Court was therefore free to consider it. *Id.* at 381-382.

The considerations that led the Court to address the questions presented in *Williams* and *Lebron* are also present here. The first question presented in the government's petition is therefore properly presented.

B. The Ninth Circuit's Ruling Conflicts With This Court's Decisions

Respondent erroneously argues (Br. in Opp. 10-11) that the court of appeals' decision is supported by *Brady* v. *Maryland*, 373 U.S. 83 (1963). *Brady* and the cases applying it hold that the government has a limited duty under the Due Process Clause to disclose exculpatory information to a criminal defendant. But under those decisions, that duty arises only when disclosure is necessary to ensure a fair trial. See Pet. 10-11. Because a criminal defendant who pleads guilty waives a trial, a duty to disclose exculpatory information under *Brady* never arises. *Matthew* v. *Johnson*, 201 F.3d 353, 360 (5th Cir.), cert. denied, 531 U.S. 830 (2000).

Respondent's observation (Br. in Opp. 10) that *Brady* applies to sentencing proceedings does not alter that conclusion. The right to a fair trial embraces not only

contested issues of guilt but also contested issues concerning punishment. It does not, however, embrace a proceeding in which a defendant admits guilt and waives a trial. No decision of this Court has applied *Brady* to a guilty plea proceeding.

Respondent similarly errs in contending (Br. in Opp. 11-12) that a prosecutor's disclosure of exculpatory material is necessary to ensure an intelligent and voluntary plea. This Court's cases make clear that, in order to make an intelligent and voluntary plea, a criminal defendant does not need to know the strength of the government's case. In *Brady* v. *United States*, 397 U.S. 742, 747 (1970), the Court specifically explained that "[w]e find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." Likewise in *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970), the Court held that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769.

Respondent contends (Br. in Opp. 15-22) that *Hill* v. *Lockhart*, 474 U.S. 52 (1985), supports the conclusion that the government's disclosure of exculpatory information is necessary to ensure an intelligent and voluntary plea. In *Hill*, the Court held that a defendant can attack a guilty plea as unintelligent and involuntary based on the ineffectiveness of counsel if he can show that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases,"

id. at 56, and that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *id.* at 59. Respondent argues (Br. in Opp. 19-20) that it would be "anomalous" to hold that a guilty plea may be attacked as unintelligent and involuntary if a defendant can show that defense counsel failed to uncover exculpatory evidence that would have caused him to go to trial, but that the plea may not be attacked on that ground if the government failed to disclose the very same evidence.

Respondent's reliance on *Hill* is misplaced. The Sixth Amendment to the Constitution contains a specific command that "[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence." The Court has explained that the Sixth Amendment guarantees the effective assistance of counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). Neither the Sixth Amendment nor any other constitutional provision commands that a defendant shall have a right to effective assistance from the government. That is hardly surprising. If the government had a duty to assist the defense that paralleled defense counsel's duty, it would "displace the adversary system," and "would entirely alter the character and balance of our present systems of criminal justice." *United States* v. *Bagley*, 473 U.S. 667, 675 & n.7 (1985).

Thus, the court of appeals' decision cannot be reconciled with this Court's decisions. Certiorari would be warranted, however, even if this Court's cases did not foreclose the result reached by the Ninth Circuit. At the very least, the Ninth Circuit's decision resolves an

important question of federal law that has not been, but should be, definitively resolved by this Court.[1]

C. The Ninth Circuit's Ruling Goes Beyond Those Of Other Circuits

Respondent contends (Br. in Opp. 11-15) that certiorari is not warranted because the Ninth Circuit's ruling in this case is consistent with that of every other circuit that has resolved the issue. In fact, however, no other circuit has gone as far as the Ninth Circuit in holding that a criminal defendant has a right to obtain material exculpatory information before entering a guilty plea.

For example, the Second Circuit has held that, when the government is *ordered* to turn over *Brady* information before trial, "its failure to do so may be a basis for vacating the guilty plea if the withheld evidence was material," but that court expressly reserved the question whether such a duty would arise in other situations. *United States* v. *Avellino*, 136 F.3d 249, 262 (1998). Respondent errs in implying (Br. in Opp. 22) that the Second Circuit resolved that question in *United States* v. *Coppa*, 267 F.3d 132, 143 (2001). *Coppa* rejected, on the government's petition for a writ of mandamus, a proposed rule that all exculpatory and impeachment evidence must be produced *immediately* on a defendant's request "even if the request is made far in advance of trial." *Id.* at 135, 146.

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[1] Certiorari is also warranted to decide the question whether, assuming that a criminal defendant has a right to receive exculpatory information before pleading guilty, that right may be waived. In general, even the most basic constitutional protections may be waived, *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), and there would be no reason to treat a newly created due process right, based on an expansion of *Brady*, to receive exculpatory information before pleading guilty any differently. See Pet. 14-16.

The Sixth Circuit and Eighth Circuits have held that the failure to disclose *Brady* evidence is simply one relevant factor in deciding whether a defendant has entered a voluntary plea. *Campbell* v. *Marshall*, 769 F.2d 314, 322-324 (6th Cir. 1985), cert. denied, 475 U.S. 1048 (1986); *White* v. *United States*, 858 F.2d 416, 422 (8th Cir. 1988), cert denied, 489 U.S. 1029 (1989). And the Tenth Circuit has held that a prosecutor's duty to disclose exculpatory information to a defendant who pleads guilty arises only "under certain limited circumstances." *United States* v. *Wright*, 43 F.3d 491, 496 (1994). None of those courts has adopted the Ninth Circuit's categorical rule that the government has a free-standing obligation to disclose all material exculpatory information before a defendant pleads guilty.[2]

Moreover, in *Matthew* the Fifth Circuit sharply disagreed with the position adopted by the Ninth Circuit, stating that "the failure of a prosecutor to disclose

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[2] Respondent errs in contending (Br. in Opp. 12 n.6) that the Sixth Circuit adopted the Ninth Circuit's rule in *United States* v. *Ross*, 245 F.3d 577 (2001). In that case, a defendant who was convicted by a jury challenged the conviction on the ground that the government had failed to disclose *Brady* information. The defendant had entered into a sentencing agreement in which he agreed not to appeal or to file post-conviction motions. Without deciding whether the defendant had waived his right to challenge his conviction, the court rejected the defendant's *Brady* challenge on the ground that the defendant had failed to establish that the information that the prosecution did not disclose was material. *Id.* at 583-584. *Ross* therefore did not involve the question presented here. In a footnote relied upon by respondent, the court cited *Campbell* for the proposition that "a state defendant may raise, after a plea of guilty, a claim that prosecutors withh[e]ld exculpatory evidence in violation of *Brady*," but the court did not purport to alter the standards established in *Campbell* for evaluating such a claim. *Id.* at 583 n.1.

exculpatory information to an individual waiving his right to trial is not a constitutional violation," 201 F.3d at 361-362, and that a defendant's awareness of *Brady* material is not an indispensable component of a voluntary and intelligent plea, *id.* at 368-369. While the Fifth Circuit ultimately rejected the defendant's collateral attack on the ground that extending *Brady* to a guilty plea would require the creation of a new constitutional rule in violation of *Teague* v. *Lane*, 489 U.S. 288 (1989), the Fifth Circuit's decision thoroughly exposes the weaknesses in the Ninth Circuit's analysis and adds to the uncertainty concerning the scope of the government's guilty plea obligations.

D. The Ninth Circuit's Ruling Imposes Serious Costs On The Criminal Justice System

Respondent finally contends (Br. in Opp. 31) that the Ninth Circuit's ruling will not adversely affect the criminal justice system because its holding applies only to the limited class of exculpatory information that is "material." That limitation, however, does not prevent the Ninth Circuit's ruling from imposing serious costs on the criminal justice system. First, as Judge Tallman emphasized in his dissent, the Ninth Circuit's ruling interferes with the government's interest in maintaining the confidentiality of its witnesses and informants. Pet. App. 38a. In some cases, premature disclosure of witnesses and informants will disrupt ongoing investigations; in others it could endanger lives. Respondent's assurance (Br. in Opp. 31) that "*Ruiz* does not require the wholesale disclosure of the identities of informers, although occasionally it may" is hardly comforting.

Second, as Judge Tallman noted, in order to comply with the Ninth Circuit's decision, prosecutors would be

required to engage in "the often time-consuming process of determining which witnesses it may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant." Pet. App. 39a. Limiting the information that eventually must be disclosed to that which is "material" does nothing to reduce the enormous burden of that process. Before the government can decide what information is "material," it first must determine who its witnesses are likely to be, and it then must search the files of all members of the prosecution team for information that might impeach those witnesses. As a general matter, the government does not begin that kind of time-intensive trial preparation until it is clear that a case is going to trial.

The Ninth Circuit's ruling therefore transforms the guilty plea process from an expeditious method for resolving criminal charges into a time-consuming task that would require a significant additional commitment of scarce government resources. It also deters the government from accepting guilty plea proposals in certain cases where the requirement to disclose impeachment information would jeopardize the role of undercover officers and informants in ongoing investigations. This Court should grant review to decide whether that fundamental change in the federal criminal justice system should occur.

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For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

THEODORE B. OLSON
Solicitor General

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